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## Note

### Public School Access: The Constitutional Right of Home-Schoolers to "Opt In" to Public Education on a Part-Time Basis

David W. Fuller\*

Annie Swanson's parents taught her at home.<sup>1</sup> Their reasons for doing so were primarily religious; they wanted to teach their daughter Christian principles not included in the curriculum at public schools.<sup>2</sup> When Annie reached the seventh grade, however, her parents decided their daughter might benefit from attending the local public school on a part-time basis to supplement the education she was receiving at home.<sup>3</sup> The superintendent granted the Swansons' request for access, and Annie took two seventh-grade classes that year. She performed well and caused no disruption to the school.

The following year, the Swansons encountered difficulties when they tried to register Annie for several eighth-grade classes.<sup>4</sup> The superintendent who had given Annie permission to attend selected seventh-grade classes had been replaced, and the new superintendent referred the issue to the school board. The board effectively excluded Annie from all participation by adopting a policy that required full-time attendance.<sup>5</sup> Following failed attempts to negotiate, the Swansons sued the school district in federal court, alleging the policy violated their rights under state and federal statutory and constitutional

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1. See *Swanson v. Guthrie Indep. Sch. Dist.*, 942 F. Supp. 511, 513 (W.D. Okla. 1996), *aff'd*, 135 F.3d 694 (10th Cir. 1998).

2. See *id.* at 516-17.

3. See *id.* at 513.

4. See *id.*

5. See *id.*

law.<sup>6</sup> The district court granted the school district's motion for dismissal, converting it to a motion for summary judgment against the Swansons.<sup>7</sup> On appeal, the Tenth Circuit affirmed.<sup>8</sup>

Since the 1980s, the number of American parents choosing to educate their children at home has risen dramatically. In their compulsory school attendance laws, state legislatures have facilitated this trend by recognizing home education as a legitimate alternative to attending either public or private educational institutions. Furthermore, state and federal courts have upheld the right of parents to home-school, often declaring unconstitutional laws that unduly burden this right.

As Annie Swanson's case illustrates, however, some home educators would also like limited access to the public schools. While these parents usually wish to continue primarily teaching their children at home, they recognize that there are certain benefits that can only be gained in an institutional setting. They have sought permission from local schools to enroll their children in select classes like chemistry or in extracurricular activities like football. While several states have statutes guaranteeing public school access to home-schoolers, public school officials have had mixed reactions in states that leave the decision to the discretion of local school boards. When negotiations have broken down, some frustrated home educators have asked courts to fashion a legal remedy that would force schools to accept their children on a part-time basis. So far, most of these lawsuits have been unsuccessful, but the question of public school access for home-schoolers is not likely to go away soon.<sup>9</sup>

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6. See *id.* at 513-14.

7. See *id.* at 518.

8. See *Swanson*, 135 F.3d at 703. To date, *Swanson* is the only federal court of appeals case involving part-time public school access for home-schoolers.

9. See Eugene C. Bjorklund, *Home Schooled Students: Access to Public School Extracurricular Activities*, 109 WEST'S EDUC. L. REP. 1 (1996); Derwin L. Webb, *Home-Schools and Interscholastic Sports: Denying Participation Violates United States Constitutional Due Process and Equal Protection Rights*, 26 J.L. & EDUC. 123 (1997); Lisa M. Lukasik, Comment, *The Latest Home Education Challenge: The Relationship Between Home-Schools and Public Schools*, 74 N.C. L. REV. 1913, 1915 (1996) ("Eighty-one percent of home educators feel that they need or want to enroll their children in extracurricular events at public schools, and seventy-six percent of home educators would also like to enroll their children 'part-time' in academic courses in public or private schools.").

This Note argues that courts should apply the doctrine of unconstitutional conditions in these cases, recognizing a right to public school access as a matter of federal constitutional law. Part I examines the status of public education as a generally available benefit offered by every state and describes the constitutional right of parents to direct the education of their own children, exploring in particular the applicability of that right in the home-schooling context. Further, Part I briefly outlines the doctrine of unconstitutional conditions. Part II applies this doctrine to the question of public school access for home educators, concluding that public schools should abandon full-time attendance requirements because they impose an undue burden on the constitutional right to home-school.

## I. THE HISTORICAL AND LEGAL BACKGROUND TO THE PUBLIC SCHOOL ACCESS DEBATE

Home-schoolers have historically been seen as cultural separatists or dissenters who prefer to have minimal interaction with "mainstream" Americans.<sup>10</sup> It has thus come as something of a surprise to many public educators that a growing number of home-schooling families are now returning to the schools, seeking permission to participate in selected classes or extracurricular activities.<sup>11</sup>

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10. See, e.g., ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH* 334 (1996) (referring to the home-schooling movement as "simply an effort to seek sanctuary, to create small islands of decency and civility in the midst of a sub-pagan culture"); WILLIAM M. GORDON ET AL., *THE LAW OF HOME SCHOOLING* 2 (1994) (describing some groups of home-schoolers as "substantially isolated from mainstream American educational values"); STEPHEN ARONS, *COMPPELLING BELIEF: THE CULTURE OF AMERICAN SCHOOLING* 191-94 (1986) (describing many home educators as "maintain[ing] a world view and beliefs at odds with majority culture"). For this reason, home-schoolers have sometimes felt they are held in disdain by public educators and others who feel they represent the American mainstream. See ARONS, *supra*, at 191-94; see also *Swanson*, 135 F.3d at 696 (noting that the new superintendent "made some statements that Mrs. Swanson interpreted as criticism of Christian home-schoolers").

11. See, e.g., *All Schoolwork and No Play?*, STAR TRIB. (Minneapolis), Oct. 20, 1997, at C1; *Home-Schoolers Want Public Access*, RICHMOND TIMES-DISPATCH, Sept. 14, 1997, at A1, *Home-Schoolers Rebuffed* Sept. 18, 1997; *Home-School Rights Issue Splits Board*, ALTOONA MIRROR (Altoona, Pa.), Sept. 18, 1997.

From the perspective of some public educators, it must seem as if the wayward Prodigal Son has finally decided to return home to his father. See *Luke* 15:11-24 (New King James version) (parable describing how a son who has left home early and squandered his inheritance on raucous and profligate living "comes to his senses," returns home, and remorsefully begs for mercy

Home educators who have encountered official resistance to their requests to opt into public education on a part-time basis have occasionally challenged school districts in court.<sup>12</sup> To date, the majority of legal attempts to coerce public schools into allowing access have failed.<sup>13</sup> The legal arguments put forward by home educators in access cases have been eclectic,<sup>14</sup> and such challenges would benefit from a more careful and systematic formulation like the unconstitutional conditions theory. This approach recognizes that, while there is no clear right to public education under the federal constitution, the government severely (or gratuitously) burdens the ability of parents to exercise their constitutional right to home-school by insisting upon full-time attendance in order to participate in the generally available benefit of public education.

#### A. THE NATURE AND LEGAL STATUS OF PUBLIC EDUCATION AS A GENERALLY AVAILABLE BENEFIT

The constitution of every state provides for a system of public education.<sup>15</sup> Acting pursuant to their respective consti-

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from his father—who, to the son's great surprise, has been eagerly awaiting his return and throws a feast in his honor). Unlike the son in the parable, however, access-seeking home-schoolers have not always been welcomed back with open arms by public schools. See *Swanson*, 942 F. Supp. at 513.

12. See, e.g., *Bradstreet v. Sobol*, 650 N.Y.S.2d 402 (N.Y.A.D. 1996); see also *Kaptein v. Conrad Sch. Dist.*, 931 P.2d 1311 (Mont. 1997) (denying request by private school student to participate in athletics at public school); cf. *Kristina M. Knapcik, Home-Schooled Boy's Family Goes to Court Over Football*, MILWAUKEE J. SENTINEL, Aug. 9, 1997.

13. See *Bradstreet*, 650 N.Y.S.2d at 404; *Swanson*, 942 F. Supp. at 518; cf. *Gayda Hollnagel, Judge Denies Home-Schooled Student's Football Request*, LA CROSSE TRIB., Aug. 20, 1997.

14. See, e.g., *Swanson*, 942 F. Supp. at 513-14 (setting forth causes of action under five distinct legal theories: deprivation of a state constitutional right to free public education, impairment of the federal constitutional right to guide and direct the education of one's children, burden on religious free exercise under the First Amendment, violation of the Religious Freedom Restoration Act, and violation of Due Process).

15. ALA. CONST. art. XIV, § 256, amended by ALA. CONST. amend. 111; ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. XI, § 1; ARK. CONST. art. XIV, § 1; CAL. CONST. art. IX, § 1; COLO. CONST. art. IX, § 2; CONN. CONST. art. VIII, § 1; DEL. CONST. art. X, § 1; FLA. CONST. art. IX, § 1; GA. CONST. art. VIII, § 1; HAW. CONST. art. IX, § 1; IDAHO CONST. art. IX, § 1; ILL. CONST. art. X, § 1; IND. CONST. art. VIII, § 1; IOWA CONST. art. IX, 2nd, § 3; KAN. CONST. art. VI, § 1; KY. CONST. § 183; LA. CONST. art. VIII, preamble & § 1; ME. CONST. art. VIII, § 1; MD. CONST. art. VIII, § 1; MASS. CONST. pt. 2, ch. 5, § 91; MICH. CONST. art. VIII, §§ 1 & 2; MINN. CONST. art. XIII, § 1; MISS. CONST. art. VIII, §§ 201 & 205; MO. CONST. art. IX, § 1(a); MONT. CONST. art. X, §§ 1, 2; NEB. CONST. art. VII, § 1; NEV. CONST. art. XI, § 2; N.H. CONST. pt.

tutional mandates, legislatures in every state have established public school regimes that share some structural commonalities. State public education systems invariably delegate a degree of authority to local school districts.<sup>16</sup> This authority typically rests with elected school boards, which exercise discretion alongside superintendents and other district-level administrators. These local officials make day-to-day as well as long-term operational decisions, manage finances, and establish policies concerning curricula, facilities, hiring, and other matters of general school governance.<sup>17</sup>

Funding for public schools comes from a combination of local, state, and federal tax sources.<sup>18</sup> District-level financing typically comes from local property taxes, and may be supplemented by municipal or district-wide sales, use, or income taxes.<sup>19</sup> State funds supplement these local funds to varying degrees, furthering the dual purposes of eliminating local budget shortfalls and minimizing the effects of income disparities between districts throughout the state.<sup>20</sup> School districts must regularly demonstrate their financial need to state education agencies in order to justify their budget requests.<sup>21</sup> Annual budgets, usually based on the previous year's operating expenses, are based on a combination of factors, including teachers' salaries, facility costs, and per-pupil allotments.<sup>22</sup>

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2, art. 83; N.J. CONST. art. VIII, § 4; N.M. CONST. art. XII, § 1; N.Y. CONST. art. XI, § 1; N.C. CONST. art. IX, §§ 1, 2; N.D. CONST. art. VIII, §§ 1, 2; OHIO CONST. art. VI, § 2; OKLA. CONST. art. XIII, § 1; OR. CONST. art. VIII, § 3; PA. CONST. art. III, § 14; R.I. CONST. art. XII, § 1, 4; S.C. CONST. art. XI, § III; S.D. CONST. art. VIII, § 1; TENN. CONST. art. II, § 12; TEX. CONST. art. VII, § 1; UTAH CONST. art. X, § 1; VT. CONST. ch. II, § 68; VA. CONST. art. VIII, § 1; WASH. CONST. art. IX, § 2; W.VA. CONST. art. XII, § 1; WIS. CONST. art. X, §§ 2, 3; WYO. CONST. art. VII, §§ 1, 9.

16. Cf. Guilbert C. Hentschke, *Emerging Roles of School District Administrators: Implications for Planning, Budgeting, and Management*, in PUBLIC SCHOOLS: ISSUES IN BUDGETING AND FINANCIAL MANAGEMENT 59-69 (John Augenblick ed., 1985).

17. See *id.*

18. See KERN ALEXANDER & RICHARD G. SALMON, PUBLIC SCHOOL FINANCE 115-30 (1995).

19. See *id.*

20. See Charles S. Benson, *State Government Contributions to the Public Schools*, in PUBLIC SCHOOLS, *supra* note 16, at 17 (describing the two main purposes of state government contributions as "to distribute the state's money directly in relation to need-to-spend and inversely with respect to local wealth").

21. See ALEXANDER & SALMON, *supra* note 18, at 191-210.

22. See *id.* at 212-13.

Funding structures for public education assume that most students will attend school on a full-time basis.<sup>23</sup> This assumption, however, does not mean that the cost of educating each student is the same.<sup>24</sup> Different kinds of students have different needs that require varying levels of service and programming.<sup>25</sup> Some states take the resulting "per-pupil cost differentials" into account through a budgeting technique known as the "weighted pupil method."<sup>26</sup> This accounting method assigns relative cost factors to students based on their grade level and whether they participate in special programs such as speech therapy, English as a second language, vocational training, or adult basic skills.<sup>27</sup> In addition, school officials and experts recognize that not all students attend the same program, or even attend school at all, on a full-time basis.<sup>28</sup>

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23. See *id.* at 213.

24. See *id.* at 212-21.

25. See Richard H. Goodman, *Providing Adequate Resources for Public Elementary and Secondary Schools*, in PUBLIC SCHOOLS, *supra* note 16, at 36.

26. ALEXANDER & SALMON, *supra* note 18, at 213.

27. See *id.* at 213-20 (describing the weighted pupil method and illustrating how it works using "educational cost differentials" from Florida in 1992-93).

28. See *id.* at 214. The official presumption of full-time attendance is a formality that does not reflect the realities of public education today. Public schools routinely make significant scheduling and other accommodations for individuals or groups of students in many types of situations. Most of these circumstances require administrative adjustments in several interdependent areas: a change in scheduling necessitates relevant shifts in staffing and curriculum, all of which may alter funding.

Sometimes scheduling flexibility on the part of public schools is prescribed by statute. For example, Minnesota's Post-Secondary Enrollment Options (PSEO) program allows high school students to leave school regularly during the day in order to attend classes at local colleges or universities, for which they receive both public secondary school credit and prospective college credit. See MINN. STAT. § 123.3514 (1996); Shuchi Anand et al., *MYN: College Head Start*, STAR TRIB. (Minneapolis), Sept. 25, 1997, at C2 (recounting success of the PSEO program, in which registered students "have a variety of options for adjusting their courses into their schedules . . . [and] can choose between full-time or part-time enrollment," and mentioning that the program allows home-schooled students to take advantage of free enrollment at participating colleges). Moreover, public schools in many states also make special scheduling accommodations for students wishing to receive religious instruction during the school day. See, e.g., MINN. STAT. § 120.101 subd. 9(3) (1996) (allowing up to three hours per week of off-site religious instruction); see also *Zorach v. Clauson*, 343 U.S. 306, 315 (1952) (upholding "release time" policies during the school day for part-time religious instruction in the face of an Establishment Clause challenge); *Lanner v. Wimmer*, 662 F.2d 1349, 1357 (10th Cir. 1981) (same).

Schools must also deal creatively with students experiencing physical, emo-

## B. THE CONSTITUTIONAL RIGHT TO HOME-SCHOOL

Although the nature of the government benefit at issue is important in unconstitutional conditions arguments, a preliminary question is whether there is a constitutional right at stake at all. In public school access cases, it is therefore essential to examine the right of parents to make the most fundamental educational decisions about their own children. If there is no such right in the federal constitution, the unconstitutional conditions analysis fails before it can begin. Fortunately for home-schoolers, the federal constitution guarantees them the right to direct the upbringing and education of their children.

Parents nationwide elect to home-school their children for a wide variety of reasons. Often the motivation is entirely religious, stemming from biblical convictions about holy living and the need to bring theological beliefs to bear on all aspects of life.<sup>29</sup> Other families choose home education for completely secular reasons, such as disenchantment with either the quality of instruction or the influences of peer interaction at public schools, or out of a general desire for parents and children to spend more time together.<sup>30</sup> Still others base their decision on

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tional, or social difficulties. Students who become ill during the day may go home early. Disruptive students are often temporarily removed by means of detention or suspension. *See, e.g.*, MINN. STAT. § 127.41 (1996) (establishing grounds and procedure for removing students from the classroom setting); *id.* § 127.29 (1996) (allowing dismissal of students who willfully violate school rules, disrupt the educational environment, or endanger other); *id.* § 127.28 (mandatory expulsion for at least one year for any student caught with a firearm in school). Others may be sent to alternative public schools specifically designed to better meet their heightened educational needs. *See, e.g.*, MINN. STAT. § 124C.46 (1996) (establishing "area learning centers" that provide vocational and other training to troubled students). Such alternative learning centers often employ individual tutoring and flexible scheduling, and may permit part-time attendance to allow for outside employment. Pregnant girls or unwed mothers also sometimes take advantage of these part-time opportunities, working or attending to their children as they earn a graduate equivalency degree (GED). *See, e.g.*, MINN. STAT. § 126.235 (1996).

29. *See, e.g.*, CHRISTOPHER J. KLIKA, *THE RIGHT CHOICE: HOME-SCHOOLING* 101-15, 171-99 (1995) (quoting numerous bible passages that highlight the duty of parents to train their children).

30. *See id.* at 21-91 (discussing failures of the public school system); HOWARD & SUSAN RICHMAN, *THE THREE R'S AT HOME* (1988) (describing two parents' reasons for home-schooling their children); MARIO PAGNONI, *THE COMPLETE HOME EDUCATOR: A COMPREHENSIVE GUIDE TO MODERN HOME-TEACHING* (1984); *see also* GORDON ET AL., *supra* note 10, at 2-3 (grouping home-schoolers into two general categories according to their motivation as "Pedagogues" or "Ideologues").



such factors as nonreligious philosophical or moral disagreement with the content of mainstream education or a general distaste for bourgeois society.<sup>31</sup> Perhaps most often the choice of home education stems from a combination of these or similar reasons.

The home education movement has grown rapidly in America over the past fifteen years,<sup>32</sup> yet it is by no means a new phenomenon in this country. Many prominent figures in national history were trained at home, for example.<sup>33</sup> Moreover, although many home educators have only a high-school degree, home-schooling tends to be highly effective in achieving many of the basic goals of education, including socialization.<sup>34</sup> De-

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31. See Joan Armon, *Is Home-Schooling for Everyone?*, in *SCHOOLING AT HOME: KIDS, PARENTS, AND LEARNING* 218-24 (Anne Pederson & Peggy O'Mara eds., 1990).

32. See GORDON ET AL., *supra* note 10, at 1 (reporting that the number of children educated at home may have increased as much as 25-fold since the 1970s). See generally Alma C. Henderson, *The Home Schooling Movement: Parents Take Control of Educating Their Children*, 1991 SURVEY AM. LAW 985 (1991) (noting the dramatic rise in the number of home-schooling families during the 1980s).

Recent cultural developments suggest that the home-schooling movement is unlikely to lose its momentum. For example, many students and parents are increasingly alarmed by dangerous conditions at public schools. See Chris Graves et al., *Gangs, Violence on the Rise in U.S. Schools*, STAR TRIB. (Minneapolis), Apr. 13, 1998, at A5. Also, continual improvements in home computer technology have enhanced the ability of many families to access a broad range of information and educational services from home. See GREG KEARSLEY, TRAINING FOR TOMORROW: DISTRIBUTED LEARNING THROUGH COMPUTER AND COMMUNICATIONS TECHNOLOGY 1-2, 11 (1985) (predicting a "new era in education and training" in which learning is "fundamentally independent of time and space", and pointing out the increasing ease of home education as a result of computer technology). In Minnesota, the Minneapolis public school system has in fact instituted a publicly funded internet education opportunity that has been most heavily used by home-schoolers. It is officially intended for children in grades 3-8 "who may be homebound due to an illness . . . or just children whose needs are not presently being met." See Cyber Village Academy, *Information* (visited March 31, 1998) <<http://www.cva.k12.mn.us/information.htm>>.

33. See KLICKA, *supra* note 29, at 153-64 (noting that among other prominent figures, "[a]t least ten" presidents were taught largely at home); see also Lukasik, *supra* note 9, at 1917 & n.31 (including George Patton, Agatha Christie, and Andrew Carnegie in a list of famous figures who were home-schooled).

34. See KLICKA, *supra* note 29, at 131-41 (pointing to high standardized test scores and college acceptance rates as evidence that home-schooled students "excel . . . well above average"); *id.* at 141-44 (refuting the argument that home-schooled children suffer in development of social skills); Lukasik, *supra* note 9, at 1918 n.33 (citing studies showing consistently dramatic academic success by home-schooled pupils).

spite home education's traditional roots and broadly documented record of success, however, home-schoolers have struggled to convince courts and legislatures that home-schooling is a legitimate pursuit.

### 1. The Liberty Interest of Parents in Rearing Their Own Children

The authority of parents to direct the education of their children was well established at common law.<sup>35</sup> But as a federal constitutional matter, the right of parents to make the most basic decisions about their children's upbringing was first clearly recognized in *Meyer v. Nebraska*.<sup>36</sup> *Meyer* involved a state statute that prohibited the use of any language other than English in public elementary schools.<sup>37</sup> Employing Fourteenth Amendment substantive due process analysis,<sup>38</sup> the Court found illegitimate the statute's attempt to impose cultural and social homogeneity on children<sup>39</sup> and therefore struck

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35. See 1 WILLIAM BLACKSTONE, COMMENTARIES \*450-53. Today, many states continue to recognize that, in principle, education is primarily a parental responsibility. See, e.g., MINN. STAT. § 120.101 subd. 1 (1996); N.H. STAT. ch. 193-A History (1997) (stating that "it is the primary right and obligation of a parent to choose the appropriate education alternative for a child under his care and supervision," and allowing home education as an "alternative to attendance at a public or private school" that is "more individualized than instruction normally provided in the classroom setting").

36. 262 U.S. 390 (1923).

37. See *id.* at 397.

38. See *id.* at 399. "Substantive due process" refers to a mode of interpreting the Due Process Clauses of the Fifth and Fourteenth Amendments such that the clauses guarantee not only certain procedural safeguards before citizens may be deprived of "life, liberty, or property," but also establish certain liberties which may not be taken away regardless of the process afforded to citizens. See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 369-93 (5th ed. 1995).

The concept of "substantive due process" employed in *Meyer*, *Pierce*, and *Farrington* has been widely criticized. See, e.g., ROBERT BORK, THE TEMPTING OF AMERICA 36-37 (1990) (decrying the Due Process Clause's "capacity to accommodate judicial constitution-making"); JOHN HART ELY, DEMOCRACY AND DISTRUST 14-20 (1980) (recounting use of the Due Process Clause "to 'support' [the Court's] sporadic ventures into across-the-board substantive review of legislative action," and describing the phrase "substantive due process" as "a contradiction in terms—sort of like 'pastel green redness'"); ANTONIN SCALIA, A MATTER OF INTERPRETATION 24 (1997) (calling substantive due process analysis "[m]y favorite example of a departure from text"); *id.* at 39 (stating that the Due Process Clause is "textually incapable of containing" new liberties).

39. See *Meyer*, 262 U.S. at 401-02. The Court at one point unfavorably compared the Nebraska policy to the radical social collectivism envisioned by

it down as an unconstitutional infringement on the "fundamental rights" of parents.<sup>40</sup>

In two cases decided soon after *Meyer*, the Court reaffirmed and amplified the right of parents to guide and direct their children's education. The clearest statement of this principle came in *Pierce v. Society of Sisters*,<sup>41</sup> in which the Court examined an Oregon statute mandating public school attendance by all children.<sup>42</sup> In response to a challenge brought by private schools, the Court struck down the statute because it "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control."<sup>43</sup> In *Farrington v. Tokushige*,<sup>44</sup> the Court further extended the authority of parents over educational decisions concerning their children by invalidating state regulations that excessively interfered with the selection of teachers and curricula at private schools.<sup>45</sup> Together, *Meyer*, *Pierce*, and *Farrington*<sup>46</sup> established the basic constitutional right of par-

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Plato's *Republic*. See *id.*

40. *Id.* at 402. The Court in the 1920s did not employ "fundamental rights" terminology. The phrase, however, is commonly used today to describe liberties which arise under a substantive due process analysis, and the Court in the 1970s did describe this liberty as a "fundamental right." See *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972); Lukasik, *supra* note 9, at 1926 n.99.

41. 268 U.S. 510 (1925).

42. See *id.* at 530.

43. *Id.* at 534-35. In a frequently quoted passage, the Court proceeded to declare:

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

*Id.* at 535.

44. 273 U.S. 284 (1927).

45. See *id.* at 298. At issue in *Farrington* was the constitutionality of a Hawaii statute requiring all foreign language schools and instructors in those schools to obtain a state permit, and to demonstrate their commitment to democratic principles and knowledge of American government and culture. See *id.* at 290-98. The Court found that by imposing government control over the "intimate and essential details" of private schools, the state was denying parents their right to "reasonable choice and discretion in respect of teachers, curriculum and text-books." *Id.* at 298. *Farrington* seems to have rested on a broadened version of the liberty interest established in *Meyer* and *Pierce*, which the Court now described as the "general doctrine touching rights guaranteed by the Fourteenth Amendment to owners, parents and children in respect of attendance upon schools." *Id.*

46. Of the three cases, *Pierce* is by far the most widely cited. This Note will sometimes refer to the constitutional right of parents to direct the up-

ents to rear their own children as they see fit, particularly in the context of schooling decisions.<sup>47</sup>

Today, courts consistently acknowledge the right of parents to direct the upbringing and education of their own children.<sup>48</sup> Although the *Pierce* right was originally recognized

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bringing and education of their children simply as "the *Pierce* right."

47. Despite widespread recognition of the *Pierce* right, several factors have created confusion over its scope, and over the standard of review it should trigger. First, many believe the right of parents to guide and direct the upbringing and education of their children has a dubious basis in the text of the Constitution, see *supra* note 38 and accompanying text (noting the controversial nature of the concept of substantive due process), and courts may be understandably hesitant to take *Meyer*, *Pierce*, and *Farrington* especially seriously for this reason.

Second, the language of "reasonableness" plays a prominent role in *Pierce*. See 268 U.S. at 534-35. Some courts see this language as indicating only "rational basis" review. See, e.g., *J.B. v. Washington County*, 905 F. Supp. 979, 991 (D. Utah 1995) (stating that "not every interference with a fundamental right will trigger strict scrutiny" such as where there is no "affirmative impediment to the exercise of that right"); *Null v. Board of Educ. of County of Jackson*, 815 F. Supp. 937, 939-40 (S.D. W. Va. 1993) (indicating that home-schooling is not a "specific fundamental right" but is only "a general liberty interest subject to reasonable state regulation"). Others, however, apply a considerably more stringent standard. See, e.g., *Jeffrey v. O'Donnell*, 702 F. Supp. 516, 519-21 (M.D. Pa. 1987) (noting that the *Pierce* right coupled with First Amendment concerns dictate a higher standard of review).

Third, beyond the traditional educational context, the *Pierce* right is potentially relevant in cases involving such issues as abortion, see *Roe v. Wade*, 410 U.S. 113, 152-53 (1973); *Casey*, 505 U.S. at 853, and contraception, see *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965). Courts sometimes seem to employ different modes of analysis depending on the factual setting in which they must apply *Pierce*.

Finally, although *Meyer* and *Pierce* forcefully articulate the theory of parental rights, the Court in both cases was also careful to insist that states retain the right to impose reasonable regulations on schools. See *Meyer*, 262 U.S. at 402; *Pierce*, 268 U.S. at 534; see also *Yoder*, 406 U.S. at 213 ("There is no doubt as to the power of a State . . . to impose reasonable regulations for the control and duration of basic education."). It is somewhat difficult to reconcile these statements with the holding of *Farrington*, in which the right of private schools to be free from government intrusion was held to be of paramount importance. See *Farrington*, 273 U.S. at 298 (characterizing the provisions at issue as going "beyond mere regulation"). Nevertheless, it seems clear that according to Supreme Court case law, states today retain significant authority to establish standards and requirements for all types of education so long as they stop short of micromanaging private schools or dictating their most basic self-definitional decisions. See, e.g., *Peterson v. Minidoka County Sch. Dist. No. 331*, 118 F.3d 1351, 1358 (9th Cir. 1997) (noting that the state's "high interest in education limits" the "liberty of parents to determine the education of their children"). Not surprisingly, this internal tension has led to contention over the point at which state regulations become "unreasonable."

48. The Supreme Court has repeatedly reaffirmed the *Pierce* right. See,

through substantive due process analysis, a growing number of courts and commentators view it as essentially a First Amendment liberty.<sup>49</sup>

## 2. The Law of Home Education

Courts today generally recognize the constitutional right to choose home education. *Wisconsin v. Yoder*<sup>50</sup> is the only Supreme Court case directly to address a situation resembling home-schooling. *Yoder* involved a challenge to a Wisconsin statute that required parents to send their children to school until the age of sixteen.<sup>51</sup> The plaintiffs, Old Order Amish parents who disdained "worldly influences,"<sup>52</sup> felt that the schooling requirement would "substantially interfer[e] with the religious development" of their children.<sup>53</sup> The Court granted them an exemption from the law,<sup>54</sup> but only because it was fully convinced that the parents' objections to formal schooling past age sixteen were completely "rooted in religious belief."<sup>55</sup> *Yoder* did

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*e.g.*, *Planned Parenthood v. Casey*, 505 U.S. 833, 849, 951 (1992) (referring with approval to the *Pierce* right); *Employment Div. v. Smith*, 494 U.S. 872, 882 (1990) (citing cases that combine the Free Exercise Clause with "other constitutional protections, such as . . . the right of parents, acknowledged in *Pierce* . . . to direct the education of their children").

49. *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (characterizing *Pierce* as involving First Amendment claims); *Henry v. Betit*, 323 F. Supp. 418, 422 n.6 (D. Alaska 1971) (stating that *Meyer* and *Pierce* were "decided in the context of a parent's quasi-first amendment right" to direct children's upbringing); *In re Falk*, 441 N.Y.S.2d 785, 790-91 (N.Y. Fam. Ct. 1981) (mem.); *see also* ARONS, *supra* note 10, at 205-208 (arguing that the First Amendment should protect belief formation, and lamenting the Supreme Court's "failure to address the First Amendment consequences of government control of the value content of schooling"); BORK, *supra* note 48, at 113 (regretting that *Pierce* and *Meyer* are methodologically suspect but noting that they "at least reflected the first amendment"); Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 69 U. CHI. L. REV. 937, 1012-19 (1996) (articulating a broad theory of "parental educative speech" that protects the right of parents to impart their values to their children directly and through schools and teachers as their agents); *cf.* *Runyon v. McCrary*, 427 U.S. 160, 176 (1976) (assuming that the First Amendment freedom of association includes the right of parents to send their children to a school that professes belief in racial segregation, but holding that the school may not actually practice discrimination).

50. 406 U.S. 205 (1972).

51. *See id.* at 207. The parents in *Yoder* had been fined five dollars for their noncompliance with the mandatory school attendance law. *See id.* at 208.

52. *Id.* at 217.

53. *Id.* at 218.

54. *See id.* at 234-35.

55. *Id.* at 215. The Court relied heavily on studies and expert testimony by sociologists in reaching its conclusion that the Amish's pervasively commu-

not rest primarily on the substantive due process right set forth in *Pierce*, but rather relied on the Free Exercise Clause of the First Amendment.<sup>56</sup> The Court found that the plaintiffs' children received an adequate alternative education outside the formal school setting<sup>57</sup> and that, in spite of their separatism, the Old Order Amish were able to flourish as a "highly successful social unit within our society."<sup>58</sup>

With *Yoder* as controlling precedent, courts have acknowledged the constitutional right to home-school most consistently where the parents' motivation is religious.<sup>59</sup> Many courts impose no religious restriction, recognizing that the right should be afforded equally to parents who choose home education for secular reasons.<sup>60</sup> In addition to outright criminal prohibitions

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nal "mode of life" and their strong religious faith were "inseparable and interdependent." *Id.* This close connection between lifestyle and religious belief was critical to the *Yoder* decision, which in fact contrasted the Amish with parents who might object to formal schooling for mere "philosophical and personal" reasons, or who simply reject "contemporary secular values accepted by the majority" as Thoreau did in his day. *Id.* at 215-16. Educational decisions based solely on "personal preference" or "subjective evaluation" would not have been protected under the First Amendment, according to the *Yoder* majority. *Id.*; cf. *Peterson v. Minidoka County Sch. Dist. No. 331*, 118 F.3d 1351, 1357 (9th Cir. 1997) (noting that acts need not be "mandated" by church teaching to be "rooted in religious belief" under the *Yoder* standard).

56. See *Yoder*, 406 U.S. at 207, 219-29. *Yoder* does reaffirm *Pierce*, however, characterizing it "as a charter of the rights of parents to direct the religious upbringing of their children." *Id.* at 233. According to the Court in *Yoder*, the "additional obligations" for which parents are responsible to prepare their children under *Pierce*, "must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship." *Id.* Thus, while it is not the main ground for decision, the *Pierce* right strengthens the Free Exercise claim in *Yoder*. It is also significant that *Yoder* describes the parental liberty interest from *Pierce* as a "fundamental interest." *Id.* at 233.

57. See *id.* at 221-25. The Court found that while not attending school, Old Order Amish children were by no means idle. Rather, they were occupying themselves productively, working with their families, and acquiring useful life skills in the process. See *id.* at 222, 224, 229.

58. *Id.* at 222.

59. See, e.g., *Michigan v. DeJonge*, 501 N.W.2d 127 (Mich. 1993).

60. See, e.g., *In re Charles*, 504 N.E.2d 592, 598, 600 (Mass. 1987) (declaring home-schooling to be a liberty interest protected by the Fourteenth Amendment and declaring that compulsory attendance laws were designed to ensure "that all children shall be educated, not that they shall be educated in any particular way" (quoting *Commonwealth v. Roberts*, 34 N.E. 402, 403 (Mass. 1893))); *Delconte v. State*, 329 S.E.2d 636, 646 (N.C. 1985) (refusing to construe North Carolina's compulsory attendance laws to prohibit home-schooling in an effort to avoid "serious constitutional questions").

On the other hand, there have always been some courts that refuse to recognize a fundamental right to home-school on any basis, regardless of motivation. See, e.g., *Clonlara, Inc. v. Runkel*, 722 F. Supp. 1442, 1456-58 (E.D.

like the statute violated in *Yoder*, courts have often indicated that some state efforts to regulate home education impose excessive burdens on the constitutional right to home-school.<sup>61</sup> Courts have never had the chance to iron out all the wrinkles in the case law because by the late 1980s states stopped attempting to prevent parents from exercising their right to home-school. Today, thirty-one states (and the District of Columbia) statutorily guarantee the right of parents to educate their children at home.<sup>62</sup>

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Mich. 1989) (upholding a criminal truancy prosecution against home-schoolers and indicating that the *Pierce* right is not fundamental apart from religious motivation); *Scoma v. Chicago Bd. of Educ.*, 391 F. Supp. 452, 460-63 (N.D. Ill. 1974) (dismissing a challenge against a law that prohibited home-schooling).

61. See, e.g., *Jeffery v. O'Donnell*, 702 F. Supp. 516 (M.D. Pa. 1988) (mem.) (striking down "educational equivalency" requirements on vagueness grounds); *Ellis v. O'Hara*, 612 F. Supp. 379 (E.D. Mo. 1985) (striking down "substantial equivalency" requirements), *rev'd*, 802 F.2d 462 (8th Cir. 1986) (reversing without opinion); cf. *Iowa v. Trucke*, 410 N.W.2d 242, 245 (Iowa 1987); *State v. Newstrom*, 371 N.W.2d 525 (Minn. 1985) (same for "essentially equivalent" requirements); *Roemhild v. State*, 308 S.E.2d 154 (Ga. 1983) (same for "private schools").

Here, too, there have been some courts that uphold equivalency or teacher certification requirements despite the burden they place on the right to home-school. See, e.g., *State v. Schmidt*, 505 N.E.2d 627, 630 (Ohio 1987); *State v. Faith Baptist Church*, 301 N.W.2d 571, 579 (Neb. 1981); *State v. Shaver*, 294 N.W.2d 883, 893-95 (N.D. 1980).

62. See ARIZ. REV. STAT. ANN. § 15-802 (West Supp. 1995); ARK. CODE ANN. §§ 6-15-501 to -507 (Michie 1993 & Supp. 1995); COLO. REV. STAT. ANN. §§ 22-33-104(2)(1) to 104.5 (West 1995); D.C. CODE ANN. § 31-402 (Michie 1993); FLA. STAT. ANN. § 232.02(4) (West Supp. 1996); GA. CODE ANN. § 20-2-690 (Michie 1992); HAW. REV. STAT. § 298-9(a)(5) (Supp. 1992); IOWA CODE ANN. §§ 299.1 & 299A.1 to .10 (West 1988 & Supp. 1996); LA. REV. STAT. ANN. §§ 17:236 & 236.1 (West 1982 & Supp. 1996); ME. REV. STAT. ANN. tit. 20-A, § 5001-A(3)(A)(3) (West 1993); MINN. STAT. ANN. § 120.101 (West 1993 & Supp. 1996); MISS. CODE ANN. § 37-13-91 (1996); MO. ANN. STAT. § 167.031 (Vernon Supp. 1996); MONT. CODE ANN. § 20-5-102(e) (1997); NEV. REV. STAT. ANN. § 392.070 (1996); N.H. REV. STAT. ANN. § 193-A (1997); N.M. STAT. ANN. § 22-12-2 (Michie 1993); N.C. GEN. STAT. §§ 115C-563 to -565 (Michie 1997); N.D. CENT. CODE §§ 15-34.1-06 to -12 (Michie 1993 & Supp. 1997); OHIO REV. CODE ANN. § 3321.04(A) (Anderson Supp. 1995); OR. REV. STAT. § 339.030(3) (1995); PA. STAT. ANN. tit. 24, § 13-1327(d) (West 1992); R.I. GEN. LAWS § 15-19-1 (Supp. 1995); S.C. CODE ANN. §§ 59-65-40 & -45 (Law. Co-op. 1990 & Supp. 1995); TENN. CODE ANN. §§ 49-6-3001(C) & 49-6-3050 (Michie Supp. 1997); UTAH CODE ANN. § 53A-11-102(1)(b)(ii) (Michie 1997); VT. STAT. ANN. tit. 16, § 1121 (1989); VA. CODE ANN. §§ 22.1-254 & -254.1 (Michie 1997); WASH. REV. CODE ANN. § 28A.225.101(1)(b) (West Supp. 1996); W. VA. CODE § 18-8-1 (Michie Supp. 1997); WIS. STAT. ANN. § 118.15(1)(a), (d)(5) (West 1991 & Supp. 1997); WYO. STAT. § 21-4-102(b) (Michie 1997). Many of these laws are simply amendments to mandatory school attendance statutes allowing home-schooling to count as the "educational equivalent" of institutional learning. Courts also sometimes infer such exceptions where they are not explicitly

Notwithstanding the pervasiveness of state legislation, a recent Ninth Circuit decision based on both the Free Exercise Clause and the *Pierce* right demonstrates the continued vitality in the courts of the constitutional right to home-school in the courts. *Peterson v. Minidoka County School District No. 331*<sup>63</sup> involved a public school principal who was terminated on the basis of his announcement that he was contemplating withdrawal of his own children from the public school system in order to enable his wife to instruct them at home. Upon hearing of the principal's rumored plans, several concerned parents called the school to voice their criticism, and many staff members said they felt "betrayed" or "disappointed" by the alarming news.<sup>64</sup> Despite these morale problems, however, the court held that the principal "was exercising a constitutional right and that accommodation of uninformed and prejudiced persons was not a compelling state interest outweighing that exercise."<sup>65</sup> Because the school board had illegitimately conditioned the principal's retention of his job on his agreement not to home-school his children, the court remanded the case to award full backpay, damages for "mental anguish,

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stated in the statute. See, e.g., *Texas Educ. Agency v. Leeper*, 893 S.W.2d 432, 443-44 (Tex. 1994).

63. 118 F.3d 1351 (9th Cir. 1997).

64. *Id.* at 1354. In addition to loyalty concerns, the Superintendent concluded that Mr. Peterson would no longer be able to function in his position as principal once his family began the project of home education, because it would require so much time and effort from the parents. See *id.* at 1354-55. The Petersons had twelve children, eight of whom were to be home-schooled. See *id.* at 1354.

65. *Id.* at 1357. The Petersons were Mormons, who wished to teach their children at home so that "in every course of study they would learn that God as the creator of all things was related to the subject at hand." *Id.* at 1356. As the court noted:

The belief in God as the creator . . . is among the most basic and most pervasive of tenets in the biblical religions that have entered into our civilization. To relate that belief to education is a type of exercise of religion. Creation by God implies purpose and design in what God has created. From the perspective of the believer God is not another category to be considered along with other forces, but a living presence guiding the teacher and the student.

*Id.* The Petersons' religious motives led the court to apply strict scrutiny to the school board's decision, but this was not because of a finding that Mormon beliefs "mandated" home-schooling. Rather, it was sufficient that Mr. Peterson's claim be "based on his personal sense of what his religion requires." *Id.* at 1356-57. Furthermore, Mr. Peterson's wife claimed to have an additional "motivation that seems secular: her love for children." *Id.* at 1356.



humiliation, embarrassment, and emotional distress," and attorney's fees.<sup>66</sup>

### 3. The Law of Public School Access

*Wehrle v. Plummer*,<sup>67</sup> the first case to address public school access, held that nonpublic school students could not be denied admission to a "manual training school" maintained by the public school system. Like most cases raising the issue of a right to opt into public education on a part-time basis, *Wehrle* did not involve home-schoolers at all, but rather students from private schools. The right of access in that case was based on a provision of the Pennsylvania School Code stating that nonattendance at a public school did not provide grounds for exclusion from the program.

The question of public school access did not arise again until the 1970s. Since then, thirteen cases have raised variations of the part-time opt-in issue.<sup>68</sup> In most of the modern

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66. *Id.* at 1360. The only work Mr. Peterson was able to find subsequent to his dismissal by the school district was as a truck driver.

67. 21 Pa. D. 182 (1911), *aff'd sub nom.*, *Commonwealth ex rel. Wehrle v. School Dist. of Altoona*, 241 Pa. 224, 88 A. 481 (1913).

68. See *Swanson v. Guthrie Indep. Sch. Dist. No. I-1*, 942 F. Supp. 511 (W.D. Okla. 1996), *aff'd*, 135 F.3d 694 (10th Cir. 1998); *Parents' Ass'n of P.S. 16 v. Quinones*, 803 F.2d 1235, 1242 (2d Cir. 1986); *Denis J. O'Connell High Sch. v. Virginia High Sch. League*, 581 F.2d 81 (4th Cir. 1978); *Valencia v. Blue Hen Conference*, 476 F. Supp. 809 (1979); *Kaptein v. Conrad Sch. Dist.*, 931 P.2d 1311 (Mont. 1997); *Bradstreet v. Sobol*, 630 N.Y.S. 2d 486 (Sup. 1995); *McNatt v. Frazier Sch. Dist.*, 1995 WL 568380 (W.D. Pa. March 10, 1995); *Davis v. Massachusetts Interscholastic Athletic Ass'n, Inc.*, 3 Mass. L. Rep. 375 (Mass. Super. 1995); *Snyder v. Charlotte Pub. Sch. Dist.*, 365 N.W. 2d 151 (Mich. 1984); *Thomas v. Allegany County Bd. of Educ.*, 443 A.2d 622 (Md. App. 1982); *Cook v. Griffin*, 364 N.Y.S.2d 632 (1975); *School Dist. of Hartington v. Nebraska Bd. of Educ.*, 195 N.W.2d 161 (1972); *School Dist. of Traverse City v. Attorney General*, 185 N.W.2d 9 (Mich. 1971).

Several cases have also addressed the "opt-out" issue, which raises similar questions of scheduling flexibility, curricular choice, administrative control over general school functions, and parental authority. See *Brown v. Hot, Sexy and Safer Prod.*, 68 F.3d 525 (1st Cir. 1995) (holding that children who found a highly lewd and sexually explicit AIDS awareness presentation morally offensive could not be excused from the event); *Fleischfresser v. Directors of Sch. Dist. 200*, 15 F.3d 680 (7th Cir. 1994) (holding that a supplemental reading program did not burden the religious beliefs of children whose parents felt they were being "indoctrinated" contrary to their faith); *Mozert v. Hawkins*, 827 F.2d 1058 (6th Cir. 1987) (holding that parents who had religious objections to the reading assignments in a literature course could not withdraw their children from the class); *Grove v. Mead*, 753 F.2d 1528 (9th Cir. 1985) (same). Some states have reacted against these decisions by enacting statutes that explicitly grant to parents who object to curricular content the right to

cases, access-seeking plaintiffs lose to defendant school districts.<sup>69</sup> Three out of the four cases that have involved home-schoolers have concluded that there is no right to attend classes or participate in extracurricular activities on a part-time basis.<sup>70</sup> Generally, however, courts seem to be somewhat more sympathetic to requests involving extracurricular activities than to requests to attend classes on a part-time basis.<sup>71</sup>

Beyond these minimal observations, however, it is difficult to identify any distinct trend. In the two modern cases granting a right of access, the plaintiffs employed remarkably divergent theories in efforts to gain part-time access to different programs.<sup>72</sup> To date, the most success has come where state statutory schemes grant access to nonpublic school students, either explicitly or under traditional interpretation.

Today, thirteen states have enacted statutes that specifically guarantee some type of public school access to students educated primarily at home.<sup>73</sup> In these states, home-schoolers

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arrange for reasonable alternative instruction. See, e.g., MINN. STAT. § 126.699 (1996). The court in *Swanson* found the opt-out cases to parallel the question raised there. "We see no difference of constitutional dimension between picking and choosing one class your child will not attend, and picking and choosing three, four, or five classes your child will not attend." *Swanson*, 135 F.3d at 700.

69. The cases that plaintiffs have lost: *Thomas, Bradstreet, McNatt, Quiñones, Swanson, Kaptein, Hartington, Traverse City, Denis J. O'Connell High School, Valencia, Cook* (citations appear *supra* note 68).

70. Access was denied in *Swanson, McNatt, and Bradstreet*.

71. Compare, e.g., *Davis*, 1995 WL 808968 at \*3, with *Swanson*, 135 F.3d at 701-02.

72. See *Snyder*, 365 N.W.2d 151 (Mich. 1984) (focusing on statute guaranteeing public education to "all children"); *Davis*, 3 Mass. L. Rep. 375 (Mass. Super. 1995) (striking down restrictive rule that operated to prevent home-schooler from participating in athletics because it violated Equal Protection analysis and failed to pass even rational basis review).

73. See ARIZ. REV. STAT. ANN. § 15-802.01 (Supp. 1995) (allowing home-schooled students to participate in interscholastic activities at public schools); COLO. REV. STAT. ANN. §§ 22-33-104.5(6) (West 1995) (allowing home-schooled students to participate in interscholastic and extracurricular activities at public schools); FLA. STAT. ANN. § 232.425 (West Supp. 1996) (allowing home-schooled students to participate in curricular, extracurricular, and interscholastic activities at public schools); IDAHO CODE § 33-203 (allowing home-schooled and other nonpublic school students to participate in nonacademic activities at public schools); ILL. COMPILED STAT. ANN. 5/10-20.24 (stating that nonpublic school students may request to enroll part-time in public schools); IOWA CODE ANN. § 281-31.5(299A) (West 1988 & Supp. 1996) (allowing home-schooled and other nonpublic school students to participate in curricular or extracurricular activities at public schools); ME. REV. STAT. ANN. tit. 20-A, § 5021 (West 1993) (allowing home-schooled students to participate in academic, cocurricular, extracurricular, and special education activities at

may enjoy some of the privileges of public education despite their inability to enroll full-time. It is conceivable that, as happened with home-schooling generally during the late 1980s, the remaining states may adopt provisions that obviate the need to litigate opt-in issues.<sup>74</sup> In the absence of such statutory arrangements, however, home-schooling parents who wish to enroll their children in public school on a part-time basis usually must make a special request to either the local principal or the school board of the district in which they reside. As long as this situation continues, lawsuits are likely to arise from time to time when reasonable requests for access are denied.

### C. THE DOCTRINE OF UNCONSTITUTIONAL CONDITIONS

Outside this area of law, courts have consistently prohibited government from forcing citizens to choose between the receipt of a benefit and the exercise of a right guaranteed by the constitution. In other words, once government has created a generally available public benefit, it may not condition enjoyment of that benefit in such a way as to impinge upon the ability of citizens to exercise a constitutional right.<sup>75</sup> There are many government programs that the government was under no

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public schools); N.H. REV. STAT. ANN. § 193A:2(II) (Supp. 1995) (stating that school districts are to "work with parents upon request" to meet legal subject requirements); N.M. REV. STAT. ANN. 195:7 & 195:8 (allowing school districts to receive funds from the state for home-schoolers to whom they provide services); N.D. CENT. CODE §§ 15-34.1-06 (1993 & Supp. 1995) (establishing a procedure for home-schools to submit to school districts a list of extracurricular activities and notice of intent to participate); OR. REV. STAT. § 339.460 (1995) (forcing school districts to allow home-school students access to public school interscholastic activities); UTAH STATE BD. OF EDUC. REG. R277-438-4 (allowing home-school students to participate in extracurricular activities); VA. CODE ANN. §§ 22.1-253-13:1(H) (providing state funding to school districts which allow home-schooled students to enroll part-time for "core subjects"); WASH. COMMON SCH. PROVISIONS 28A.150.350 (school districts must permit enrollment of and provide ancillary services for home-schooled students enrolled part-time); WYO. HIGH SCH. ACTIVITIES ASSOC. RULES 3.1.3, 6.2.0, 6.4 (allowing home-schooled students to play on participating schools' sports teams).

74. See *supra* note 62 and accompanying text. At present this outcome seems unlikely. Several state legislatures have considered but rejected public school access statutes that would have benefited home educators.

75. See, e.g., *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987); *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136 (1987); *FCC v. League of Women Voters*, 468 U.S. 364 (1984); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Thomas v. Review Bd.*, 450 U.S. 707, 716 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Speiser v. Randall*, 357 U.S. 513 (1958).

initial obligation to establish. Once it does so, however, it still may not impose conditions on the receipt of that benefit that, in the absence of the benefit, it could not have imposed directly.<sup>76</sup>

Conditions attached to generally available benefit packages may be unduly burdensome<sup>77</sup> in either of two ways. First, they may be so severe that they prevent altogether the exercise of the constitutional right at issue.<sup>78</sup> Second, conditions may be unreasonably burdensome if they are gratuitous, that is, where it would be virtually costless for the government to waive them and they impose high replacement costs on the citizens they burden.<sup>79</sup>

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76. See, e.g., Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989, 1015 (1991) ("A common understanding of constitutional law is that although the government has no obligation (absent exceptional circumstances) to subsidize the exercise of constitutional rights, it is forbidden to penalize the exercise of those rights."); Michael Stokes Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on "Equal Access" for Religious Speakers and Groups*, 29 U.C. DAVIS L. REV. 653, 664-65 (1996) ("Government may not condition one legal right, benefit, or privilege on the abandonment of another legal right, benefit, or privilege, the relinquishment of which the government would not have authority to command directly."); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989) (stating that the doctrine prevents government from "grant[ing] a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether"); William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1445-46 (1968) (stating that "whatever an express constitutional provision forbids government to do directly it equally forbids government to do indirectly").

77. Courts are not in full agreement as to the precise technical standard of scrutiny to accord the constitutional right to home-school. See *supra* note 47 (indicating variances in understanding and application of *Pierce*). A detailed exploration of standard of review issues is beyond the scope of this Note. One possibility would be to employ the "undue burden" standard articulated in *Planned Parenthood v. Casey*, 505 U.S. 893 (1992). See Jon S. Lerner, *Protecting Home Schooling Through the Casey Undue Burden Standard*, 62 U. CHI. L. REV. 363, 364 (1995).

78. See Paulsen, *supra* note 76, at 664-66.

79. See *id.* at 665-67; see also, e.g., *Romer v. Evans*, 517 U.S. 620 (1996) (holding unconstitutional an amendment to the Colorado constitution that effectively prevented homosexuals from participating fully in the political process, and finding that the provision did not pass even rational basis review because there could be no explanation for the law apart from "sheer animus").

Utter disabling of the exercise of a constitutional right on the one hand, and utter gratuitousness of the condition on the other hand, are only the two most extreme forms of the unconstitutional conditions argument. In between these poles lies a broad middle ground occupied by many lesser (and many less gratuitous) conditions that still impose substantial burdens on constitutional rights. For example, a regulation may be found to be so economically

There are practical limits to the unconstitutional conditions argument, however. Sometimes, even conditions that do infringe on constitutional rights are inherently necessary to the provision of a government benefit.<sup>80</sup> When this is the case, courts will allow the condition to stand despite the infringement.<sup>81</sup> Additionally, conditions that would otherwise be unconstitutional may be justified by a compelling government interest.<sup>82</sup>

Where courts strike down unconstitutional conditions, they generally attempt to salvage every remaining provision of the government program or benefit that poses no constitutional defect.<sup>83</sup> This piecemeal treatment of statutory schemes requires a determination that the defective portion is "severable" from the rest of the program or benefit.<sup>84</sup> Supreme Court precedent has established a strong presumption in favor of severability in statutory interpretation.<sup>85</sup> Generally, courts will deem a statutory provision severable if, in its absence, the re-

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coerce that it effectively prohibits any meaningful choice.

Many of these intermediate conditions will also be struck down as unconstitutionally severe, though in a literal sense they may not completely bar exercise of a constitutional right, and though the comparison between replacement costs to the burdened citizen and costs to the government of lifting the burden may be closer. This Note will focus only on the two extremes, for purposes of illustrating how an unconstitutional conditions analysis might function in public school access cases generally. Actual arguments made in court will of course depend on the specific facts of each case.

80. See Paulsen, *supra* note 76, at 665 (noting that the unconstitutional conditions doctrine cannot apply when the condition is "inseparable from . . . the nature of the right or benefit itself"). The Supreme Court found this to be the case in *Rust v. Sullivan*, 500 U.S. 173 (1991), where Congress was allowed to condition funding of a family planning program on agreement not to provide abortion counseling because such counseling was deemed alien to the very nature of the program itself.

81. See Paulsen, *supra* note 76, at 665.

82. See McConnell, *supra* note 76, at 1015 (mentioning "exceptional circumstances" and "strong, perhaps compelling, justification" as necessary to overcome unconstitutional conditions argument).

83. See, e.g., *Widmar v. Vincent*, 454 U.S. 263, 270 (1981).

84. See *Alaska Airlines v. Brock*, 480 U.S. 678, 684-85 (1987).

85. See *Buckley v. Valeo*, 424 U.S. 1, 108-09 (1976) (per curiam) ("Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." (citations omitted)). In addition to the statutory interpretation setting, the notion of a general presumption of severability appears in other contexts as well. See, e.g., *Williamson v. United States*, 114 S. Ct. 2431, 2434-35 (1994) (treating witness testimony as "severable" for hearsay exclusion purposes by defining a "statement" as a single remark rather than an extended narrative).

mainder of the law can be reasonably carried out without violating the overall purpose of the statute.<sup>86</sup>

## II. APPLYING THE UNCONSTITUTIONAL CONDITIONS ARGUMENT TO "OPT-IN" CASES: DENIAL OF PUBLIC SCHOOL ACCESS AS AN UNDUE BURDEN ON THE RIGHT TO CHOOSE HOME EDUCATION

The majority of public educators believe they are able to provide an educational product at least equivalent in quality to that which can be obtained through home instruction.<sup>87</sup> Most of the factors that make public education a positive good for full-time students would seem to apply equally to students seeking to attend on a part-time basis. Home-schoolers who seek access to the public schools are beginning to agree, and are seeing gaps in their own instructional abilities in some respects.<sup>88</sup> Their opt-in requests thus acknowledge that there is some positive value in the public educational enterprise.<sup>89</sup>

The ultimate motivation of public educators ought to be to serve the public good by ensuring that the product they offer is of the highest quality, and by providing that product to as many children as would benefit from it in accordance with the constitutional mandates of their states. To the extent that this is their motivation, one would expect public educators to be thrilled to learn that many home-schoolers have finally come to see the real benefits public schools have to offer them, and are now requesting the services of public schools instead of continuing to instruct their children in isolation from the cultural and educational mainstream.<sup>90</sup>

At a time when many have called into doubt the very viability of public education,<sup>91</sup> home-schoolers—traditionally per-

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86. See, e.g., *FCC v. League of Women Voters*, 468 U.S. 364 (1984) (holding that an unconstitutional restriction on the ability of radio stations to express their views using their own funds was separate from a governmental interest in controlling expression supported by its own funds).

87. See, e.g., *GORDON ET AL.*, *supra* note 10, at 5.

88. Perhaps not unlike the Prodigal Son who had come to the end of his resources and found himself enjoying his freedom less than he had anticipated. See *supra* note 11.

89. As in the parable, these parents have returned "home" repentant and prepared to beg for mercy, in search of food and shelter they could not provide for themselves. See *supra* note 11.

90. See *supra* note 10 and accompanying text (noting widespread perception of home-schoolers as separatists).

91. Outright attacks on public education—sometimes by well-organized

ceived as rivals of the public schools—have tacitly agreed that there is much the public schools have to offer. The public education establishment might therefore be expected to go to great lengths to accommodate part-time access requests in any way possible.<sup>92</sup> But in many districts just the opposite has happened, and schools have been reluctant in the face of what seem to be reasonable requests that actually affirm the value of public education.<sup>93</sup>

Probably the best solution, and one that has worked well in several states already, is for the legislature to pass a statute ensuring that public schools grant reasonable requests by home-schoolers for part-time access to the public schools. However, some state legislatures have considered such legislation but failed to enact it, often as a result of heavy lobbying efforts by teachers' unions. In states without statutes assuring home-schoolers they can have part-time access to the public schools, courts will continue to be brought into the dispute where negotiations between local school districts and home educators break down. It is therefore critical for courts to think clearly and systematically about the issues these cases present.

The unconstitutional conditions doctrine clearly applies to the right to home-school, especially since the doctrine has become so well established in First Amendment case law.<sup>94</sup> Ab-

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interest groups—are increasingly commonplace today. See, e.g., *Proclamation for the Separation of School and State*, (visited Nov. 17, 1996) <<http://www.sepschool.org/proclamation.html>> (asserting that, no matter how good the instruction, a "Common School" system cannot address the "differing hopes Americans hold for their children," and concluding that "in a pluralistic society, we must undo government compulsion in school funding and attendance"). See generally CHARLES J. SYKES, *DUMBING DOWN OUR KIDS: WHY AMERICA'S CHILDREN FEEL GOOD ABOUT THEMSELVES BUT CAN'T READ, WRITE, OR ADD* (1995).

92. Like the patiently waiting father in the parable, public schools should rush to embrace penitent home-schoolers, and figure out some way to "throw a feast" in their honor. See *supra* note 11.

93. The schools offer various versions of the "administrative inconvenience" excuse to justify denying part-time enrollment requests. These arguments often ring hollow in the face of the facts. See *infra* notes 106-123 and accompanying text (demonstrating that denying requests for part-time access is gratuitous). Ultimately, it could be that the public education establishment feels that so long as home-schoolers seek to use public school services on a part-time basis, they are not yet truly "penitent"—and the schools are holding out until repentance is complete.

94. See *supra* note 49 and accompanying text (noting that the *Pierce* right today is widely conceived as an aspect of freedom of expression under the First Amendment); McConnell, *supra* note 76, at 1015 ("The most extensive

sent compelling justification, states may not condition the enjoyment of any generally available benefit—including public education—on relinquishment of the right to home-school. Because public education is a benefit intended for all citizens, it therefore may not be offered in such a way as to burden home education unduly.

#### A. THE SEVERABILITY OF FULL-TIME ATTENDANCE POLICIES

Public school access cases are essentially challenges to a single aspect of public education policy: full-time attendance requirements.<sup>95</sup> Therefore, a systematic approach to these cases must begin with a preliminary inquiry into whether those requirements are severable. If full-time attendance policies are deemed to be unnecessary to the provision of the overall benefit package of public education, then they are potentially dispensable, and courts may scrutinize them separately in order to determine whether they burden the constitutional right to home-school unduly.<sup>96</sup>

It seems evident that public schools would still be able to provide an adequate education if they allowed some students to attend on a flexible or part-time basis. In fact, many circumstances already exist in which schools must accommodate unusual or irregular student scheduling issues. Sophisticated modern budgeting methods and management techniques provide adequate means of taking these adjustments into account.<sup>97</sup> Perhaps the strongest evidence that full-time attendance rules are not essential to the provision of public education is the substantial number of states with statutes that already mandate the allowance of part-time access to classes or extracurricular activities for home-schoolers.<sup>98</sup> Therefore, courts should find these attendance policies fully severable from the overall benefit package on the basis of the inherently flexible nature of

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body of doctrine bearing on [the unconstitutional conditions doctrine] has arisen under the free speech clause.”); *see also, e.g.*, *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Widmar v. Vincent*, 454 U.S. 263, 273-77 (1981) (holding that once a university has created an “open forum,” it may not prevent religious groups from using it on an equal basis). *Peterson*, a case involving home-schooling, was decided on an unconstitutional conditions-type theory. *See supra* notes 63-66 and accompanying text.

95. *See, e.g.*, 135 F.3d 694, 696-97 (10th Cir. 1998) (quoting the Guthrie School Board’s challenged full-time attendance policy).

96. *See supra* notes 84-86 and accompanying text.

97. *See supra* notes 25-27 and accompanying text.

98. *See supra* note 73 and accompanying text.



the educational enterprise. To the extent that full-time attendance requirements stand in the way of granting part-time access to home-schoolers who feel their constitutional rights are burdened, courts should examine them on their own merits, separately from the overall scheme of public education.

#### B. THE SEVERITY OF THE BURDEN ON HOME EDUCATION

In public school access cases, the burden caused by full-time attendance requirements will be considered unconstitutionally severe if courts find that, with respect to a particular plaintiff, home education cannot continue so long as the policy is in place. School administrators are sure to point out that home education has taken place successfully in the past, even in localities with school districts that strictly prohibit part-time attendance by unenrolled students. In particular, they may contend, the remarkable increase in the number of home-schooling families over the past fifteen years demonstrates that the inability of home educators to opt into the benefits of public education must not really be a debilitating handicap.

This significant argument is not dispositive, however, because it does not take into consideration the varying skill levels of parents who wish to home-school their children. In fact, many parents who would prefer to educate their children at home are effectively prevented from doing so because of the refusal of local school districts to allow part-time attendance. For all practical purposes, these parents are unable to exercise their constitutional right to choose home-schooling because the only feasible way for them to meet statutory equivalency requirements is to have their children participate in advanced math, chemistry, or some other course that is already offered by the local public school but that the parents themselves lack the wherewithal to provide.<sup>99</sup> These parents would be able to home-school but for the refusal of their local school district to

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99. See Lukasik, *supra* note 9, at 1960 n.307. The severity of the burden on the right to home-school would of course increase dramatically in situations where state statutes require that the education provided by parents at home be "equivalent" to that which they could have obtained through the public school system. To date, parents completely prevented from home-schooling by such statutes have not appeared in public school access cases, because those cases have been initiated only by people who have already been home-schooling.

allow part-time attendance at critical courses that would round out their child's educational experience.<sup>100</sup>

Thus, at least in situations where gaps in instructional abilities prevent parents from being able to home-school without access to at least some upper-level courses at public schools, the burden imposed on home educators by full-time attendance requirements is severe.<sup>101</sup> If courts take the constitutional right to elect home education seriously, they should insist that school districts grant part-time access to home-schoolers under such circumstances.

An obvious policy objection arises at this point. Considering the foregoing argument about home-schooling parents who are unable to teach their children adequately in certain areas of the curriculum, it may occur to many to ask why such parents should be allowed to home-school at all. Perhaps more surprising is the fact that these parents, knowing they lack expertise with respect to important curricular areas, would even *want* to teach their children at home. It may even be argued that, by refusing to send their children to either public or private school, such parents are harming their children through deprivation or "educational neglect."<sup>102</sup>

A balanced response to this objection must acknowledge that there are some families for whom home-schooling would be an unwise choice, and for whom a decision to home-school would work to the detriment of children and parents alike. Many parents lack the time, skills or resources to do an adequate job of teaching their children at home. Others claim they

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100. Consider, for example, the parent who is knowledgeable in the humanities and social sciences but less skilled at teaching secondary-level math and science. With sufficient time and resources, this parent could either educate herself or hire someone to assist her with high school math and science classes, and thereby provide an adequate home education for her children. By requiring home educators to have a bachelor's degree, some states have in effect mandated this problem by law. See, e.g., *Crites v. Smith*, 826 S.W.2d 459 (1991).

More likely, though, she would simply be unable to home-school at all without access to particular classes at the local public school. In this scenario, a school district refusing to grant access to home-schoolers would effectively deprive this family of the ability to obtain a home education at all. Such deprivation may be good or bad, depending on one's policy preferences and the facts of particular cases. Clearly, where state legislatures have imposed equivalency or certification requirements, there is a realization that some families will thereby be prevented from home-schooling.

101. See McConnell, *supra* note 76, at 1003, 1030.

102. See, e.g., *Carroll v. Wright*, No. 97-CA56, 1997 WL 691468 (Ohio Ct. App. Nov. 7, 1997)

are "home-schoolers" but really use the label as a cover for outright laziness—or even abuse—that would not be possible to the same extent if their children regularly attended an educational institution.<sup>103</sup> As to this latter type of parent, it seems clear that the constitutional right to home-school should be overridden by the compelling state interest in the well-being of children.

But as to parents who simply lack sufficient time, skills, or resources to home-school effectively, courts should take a more measured approach. Presumably, most such parents—particularly those who have too little time—will recognize their own inability to home-school and forgo it in light of their family situation.<sup>104</sup> Those others, however, who do decide to home-school in spite of their shortcomings will have made a genuine mistake that results in some degree of harm to their own children.<sup>105</sup> These parents may or may not ever become aware of this harm.

The importance of this problem should not be minimized. However, many factors complicate the situation and work together to indicate that it is probably best to allow parents the freedom to make some mistakes with home education rather than to extinguish altogether their right to home-school at even the slightest sign of educational harm to children. First, attempts at home-schooling are often short-lived.<sup>106</sup> Where parents decide to experiment with teaching their children at home, only to abandon the effort a short time later, the harm done to the children is probably minimal.

Second, as the very existence of the home-schooling movement illustrates, Americans have widely divergent views about what is really important in education. Moreover, it is important to recall that many people who decide to home-school are primarily motivated not by educational or curricular considerations but

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103. See, e.g., *Matter of Devone*, 356 S.E.2d 389 (N.C. Ct. App. 1987).

104. This is particularly true since most parents want their children to receive a good education. See *Gilles*, *supra* note 49, at 1003 (setting forth policy arguments in favor of a robust theory of "parental educative speech" rights, including the notion of "parental ideals").

105. The amount of "harm" depends, of course, on the degree to which the education that was given up in favor of home-schooling would have been superior to the home education actually received. In some cases, the differences would be negligible even though the parents may suffer from significant gaps in their own teaching abilities.

106. See *Lukasik*, *supra* note 9, at 1913 n.3.

rather by concerns over issues such as socialization.<sup>107</sup> These basic differences of opinion would clearly affect beliefs about what should count as educational harm, and would even lead to varying conclusions as to the relative importance of educational harm as compared to other values such as religious training or family bonding. Liberal political theory cautions against vesting in any one individual or institution too much power to impose on the populace-at-large its views concerning such fundamental matters.<sup>108</sup>

Finally, allowing part-time access would actually minimize the possible risks of educational harm associated with the home-schooling movement. Granting opt-in requests would remove incentives for parents who teach their children at home to exaggerate their own skills and resources. Public schools that take the all-or-nothing approach force parents to choose between full-time enrollment on the one hand, and total nonparticipation in public education on the other. If home-schoolers must "do it all," those whose desire to home-school is strong enough will find ways to convince themselves and others that they are capable of doing so, even if this is not entirely true.<sup>109</sup> Thus, full-time attendance policies may unwittingly discourage parents who wish to home-school from being completely forthright about their own shortcomings as teachers in order to avoid the conclusion that they are basically unfit to home-school.

A more flexible approach would convert this danger into an asset, since gaps in the instructional abilities of parents would no longer threaten to incapacitate them from home-schooling altogether but rather would act as an indicator that supplemental help is appropriate in those areas. This would benefit home-schooling parents and their children, and would also further the interests of society and the public education establishment in promoting effective education generally. There-

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107. See *supra* note 30 and accompanying text.

108. *Yoder*, 406 U.S. at 232-33; see also JOHN RAWLS, *POLITICAL LIBERALISM* 134-35 (1993) (describing political liberalism as a system that "allow[s] for a plurality of reasonable though opposing competitive doctrines each with its own conception of the good"); ALASDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* 335-37 (1988) (describing modern liberalism as an attempt to "enable those who espouse widely different and incompatible conceptions of the good life for human beings to live together peaceably within the same society").

109. To say that full-time attendance requirements may abet dishonesty in some cases is not to imply that the typical home-educator would succumb to this temptation.

fore, to the extent that the home education movement may raise the possibility of educational harm to children,<sup>110</sup> public school access could serve to remedy this problem.

### C. ATTEMPTING TO JUSTIFY THE DENIAL OF ACCESS

The foregoing discussion yields the conclusion that, in some circumstances, full-time requirements may represent burdens on home-schoolers so severe that courts should impose exemptions or strike them down as unconstitutional because they effectively prevent some parents from being able to home-school their children. But a burden of this severity exists only when parents lack the skills or resources necessary to provide adequate or "equivalent" education to their children at home and therefore need access to public school classes in order to home-school at all. Even apart from these extreme cases, however, denying part-time access requests may be unduly burdensome to the constitutional right to home-school in another way: it may be so unreasonable for schools to deny access to home-schoolers that courts should strike down full-time requirements in all cases.

Full-time attendance policies often impose purely gratuitous burdens on the right to home-school. The policies are gratuitous if full-time attendance policies place a burden on home-schoolers that is entirely out of proportion to the government's need to retain the policies. One way courts might determine this would be to compare the costs public schools would incur by waiving full-time requirements with the "replacement" costs to home-schoolers—the costs of obtaining the currently unavailable benefit on their own.

The principal justification school districts offer when denying home-schoolers permission to opt into classes or extracurricular activities is that of administrative inconvenience.<sup>111</sup>

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110. If the past serves as any indicator, this would be very rare. See *supra* note 34 and accompanying text.

111. See Lukasiak, *supra* note 9, at 1967-69 (cataloguing the "numerous practical and administrative problems" created by granting access requests). To be fair to the schools, it is worth recalling that in many instances they are struggling for their very survival. Subject to a barrage of constant criticism in the daily papers, faced with increasing violence, laziness, and a general lack of respect and discipline among pupils, and often badly strapped for funds, administrators and teachers alike are caught in the middle of a destructive cultural war. Too often, the greatest casualty of that war is educational quality itself (thus ultimately causing the students to suffer), as public schools strive to continue providing a quality educational product while satisfying their

While this rationale falls far short of a compelling government interest,<sup>112</sup> it does represent a genuine concern on the part of public educators. Schools claim that by allowing unenrolled students to attend classes on a part-time basis they may encounter the need to readjust their schedules or hire additional instructors.<sup>113</sup> Stretching these justifications further, some commentators have even made the argument that part-time students would linger on school premises, requiring educational institutions to provide them with costly supervision—essentially reducing schools to “child care” facilities.<sup>114</sup> These adaptations would require financial and other resources that would be diverted from full-time students.

In fact, however, public school access for home-schoolers would not be overly difficult or costly to provide. There already exists in every state a ready-made institutional system designed specifically to deliver the benefit of public education to all children residing within the state.<sup>115</sup> This benefit is typically mandated by the state constitution, and is intended for all citizens.<sup>116</sup> Therefore, rather than seeking substantial alteration of the status quo, home-schoolers requesting public school access are simply asking for a subset of an existing benefit in the context of a society with functioning institutions well suited to grant it. Public schools already allow students to participate in their programs on a flexible basis in many situations,<sup>117</sup> and their funding structures are often carefully calibrated to take part-time attendance and other complicating factors into account.<sup>118</sup>

Courts should also recognize that because home-schoolers are paying for a benefit they never receive, they currently represent a significant financial boon to most public education systems. Home-schooling families continue to pay taxes at the same rate as other citizens,<sup>119</sup> yet they have declined to take

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various constituents to the best of their ability.

112. See *supra* note 82 and accompanying text.

113. See Lukasik, *supra* note 9, at 1967-68.

114. See *id.*

115. See *supra* notes 15-28 and accompanying text.

116. It is even plausible to think of children who are educated at home as remaining officially within the public educational system. North Dakota, which currently imposes this understanding by statute, may be ahead of its time. See N.D. CENT. CODE 15-34.1-06 to -11 (1993 & Supp. 1995).

117. See *supra* note 28 and accompanying text.

118. See *supra* notes 25-27 and accompanying text.

119. The lack of remuneration to home-educators may not be unconstitutional in and of itself. See *supra* note 79 (discussing the problem of interme-

advantage of public education. Conversely, at least at the statewide level, public school programs have access to more money relative to their operating expenses because each home-schooled child represents another taxpaying family that is presently costing the schools nothing.

In arguing that allowing home-schoolers to opt in would be fiscally burdensome for them, schools measure the potential costs associated with part-time access against the complete lack of costs represented by the current circumstance in which home-schoolers are altogether absent from the public schools. Instead, school boards and courts should consider access costs in relation to the opposite alternative—the cost of having those same students attend on a full-time basis.<sup>120</sup> This approach would recognize the appropriate baseline for accurate financial comparison.<sup>121</sup> Particularly in situations where home education cannot occur at all without supplemental classroom instruction in one or more important subject areas, it would cost schools less, not more, to allow access. Although some immediate administrative expenses would arise when home-schoolers attend on a part-time basis, the costs of accommodating opt-in requests would usually fall far short of the costs of providing full-time education—which home-schoolers, like all other citizens, are already free to demand at any time if they decide to quit home education. Recognizing that home educators represent a net monetary savings to public school systems, even when they do participate in those systems on a limited basis,<sup>122</sup> belies the

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diate burdens, including economic coercion). Generally there is no positive governmental obligation to assist someone in the exercise of a constitutional right. *See, e.g., Harris v. McRae*, 448 U.S. 297 (1980); *McConnell*, *supra* note 76, at 1015. *But see Gideon v. Wainwright*, 372 U.S. 335 (1963) (recognizing an exception to this rule in the context of the Sixth Amendment right to the assistance of counsel for indigent defendants).

120. *See, e.g., Public Funds for Pub. Sch. of N.J. v. Byrne*, 590 F.2d 514, 521 (3d Cir. 1979) (concurring opinion) (“[P]arents who send their sons and daughters to nonpublic schools spare the state and its taxpayers the not inconsiderable expense of educating these children a cost that would otherwise be incurred in fulfilling the state’s obligation to provide a free primary and secondary education”).

121. *See* CASS SUNSTEIN, *THE PARTIAL CONSTITUTION* 68-92 (1993).

122. Many access-seeking home-schoolers have even indicated a willingness to pay public schools to defray the administrative costs associated with granting their requests for part-time attendance. While this gesture should be unnecessary in light of the argument set forth here, it could further strengthen the case for access, and highlights even more clearly the hollowness of the reasons set forth to justify denying home-schoolers the right to opt into public schools.

argument that it is too costly for schools to accommodate requests for access.

In comparison, the costs to home-schoolers who have been denied permission to enroll in classes or extracurricular activities on a part-time basis may be great. For example, with advanced secondary school classes of the sort that typically appeal to home-schoolers, there are basically two types of replacement costs. First, parents currently unable to teach an advanced course would be forced either to hire a tutor or to educate themselves sufficiently to be able to teach the material themselves. In terms of both time and money, both options would represent a substantial drain on home-schooling families—particularly in comparison with the nominal cost to public schools of allowing one additional student to attend a large class taught by an instructor already trained in the subject matter. Second, there may be equipment and facilities costs for home-schoolers to bear if they wish to provide their children with educational experiences qualitatively comparable to those enjoyed by public schools. It would be difficult to teach advanced chemistry, for example, without expensive laboratory equipment. While purchasing such equipment would probably require significant expenditures by home-schoolers, it would cost public schools relatively little incrementally because of the greater potential for long-term usage, greater number of users, and already-existing facilities.<sup>123</sup> Refusals by public educators to include home-schoolers who wish to take classes, join team sports, or play in musical groups therefore appear to be unjustified and highly gratuitous.

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123. Both types of replacement costs—those associated with training for the home-schooling parent, and those associated with the purchase of essential equipment—are also present in the case of extracurricular activities. Schools with football teams, for example, typically have fields, protective equipment, and trained coaches. Home-schooled students who wish to play football but are denied access to the local public school team, on the other hand, would not only need to assemble a sufficient number of fellow students—perhaps other home-schoolers—to form a team, but they would also need to locate a capable coach, equipment, and playing field. This would all require substantial expenditures of time, energy, and money that could be saved if home-schoolers were allowed to participate in the team at the local public school. Parallel observations could be made about other athletic activities like swimming or baseball, musical organizations like orchestra or marching band, and other extracurricular activities. In most of these cases, it is hardly even worth asking who would bear the greater costs.



## CONCLUSION

In states that lack statutory schemes guaranteeing home-schoolers part-time access to public education, many local school districts will continue to deny opt-in requests.<sup>124</sup> Courts should begin employing unconstitutional conditions analysis when considering the question of whether home-schoolers have the right to attend classes and participate in extracurricular activities at public schools on a part-time basis. Under *Pierce*, the First Amendment guarantees parents the right to direct the upbringing and education of their children, and this clearly includes the right to home-school. In order to preserve this important parental freedom fully, courts should inquire whether full-time attendance requirements place a severe or gratuitous burden on the right to home-school.

Because full-time attendance policies are not integrally related to the benefit of public education in such a way that the state could not offer the benefit without the requirements, they are severable and may be considered (and, if found to be unconstitutional, struck down) on their own, leaving the remainder of the public education scheme intact. When home educating parents lack skills in important curricular areas, these policies impose a severely burdensome condition on the constitutional right to home-school by effectively undermining home education as a viable alternative for them. Even when parents are not lacking in teaching skills, however, full-time attendance policies are gratuitous: they are not justified by the inordinate costs they impose on access-seeking home educators generally—costs out of all proportion to the costs public schools would bear as a result of becoming more flexible. Therefore it is not acceptable for school districts to prevent home-schoolers from attending classes or participating in extracurricular activities on a part-time basis, and courts should strike down full-time attendance policies because they impose an unconstitutional condition on the right of parents to instruct their children at home.

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124. Unfortunately, there is no guaranteed way to change the hearts of resistant school administrators in order to make them more like the enthusiastic and welcoming father in the Prodigal Son story. See *supra* note 11.